IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-793

HOUSTON LIGHTING AND POWER COMPANY
and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE FOR AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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BRIEF AMICI CURIAE

In accordance with this Court's Rule 42, the American Public Power Association, Edison Electric Institute, and the National Rural Electric Cooperative Association ("Amici") have received the written consent of counsel for all parties to file this brief as amici curiae. Copies of the consents have been filed with the Clerk.

Amici submit this brief in support of the Joint Petition For Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by Houston Lighting and Power Company ("Houston") and Arizona Electric Power Cooperative, Inc. ("Arizona") on November 20, 1979.

Identity and Interest of Amici

The American Public Power Association is a national service organization representing more than 1400 local, municipally owned electric utilities in 48 states, Puerto Rico, the Virgin Islands, American Samoa and Guam. Local publicly owned utilities serve approximately 14% of all U.S. consumers.

Edison Electric Institute is the association of the Nation's investor-owned electric utilities. Its members serve 99.6% of the customers serviced by the investor-owned segment of the industry. They generate more than 77% of all the electricity in the country and serve more than 77% of all ultimate customers of electricity.

The National Rural Electric Cooperative Association is a national service organization whose membership consists of roughly 1,000 rural electric cooperatives. These member systems supply electricity to over 25 million people in 46 states.

Coal now serves as a primary boiler fuel for electric generating facilities providing approximately 45% of the electric power generated in this country.[1] For most of these facilities, the railroads offer the only feasible means of transporting coal from the mine to the point of consumption at the utility plant. This is true whenever a generating station is served by a single railroad or a mine on which the utility is dependent for coal, usually under a long-term contract, is served by a single railroad. Thus, these utility coal shippers are "captive" to the railroads for the coal transportation services which they require. In many cases, as illustrated by the factual circumstances of the Houston and Arizona movements directly involved in this proceeding, this captivity is not only to the rail mode

[1] *Monthly Energy Review*, United States Department of Energy Information Administration—0035/7(79), July, 1979, at 62.

in general, but to particular railroads that possess monopolies over rail traffic moving from the particular mine to the individual utility plant. Under these circumstances, which prevail for a large percentage of coal-fired utility plants, the railroads possess extremely broad monopoly pricing power which can only be moderated through the maximum rate regulation authority granted to the Interstate Commerce Commission ("Commission" or "ICC") under the revised Interstate Commerce Act.[2] For this reason, amici and their members are directly and vitally concerned with the issues raised by the Houston and Arizona petition for a writ of certiorari. This interest is heightened by the fact that in response to the Nation's need to reduce dependence on foreign energy sources and in compliance with federal programs[3] the percentage of electric power generated from coal by amici's members will be increasing dramatically in coming years. Inevitably, the great majority of this coal will also move by railroad.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED BY THIS CASE WARRANT THIS COURT'S REVIEW.

This case presents at least two important legal questions. Those questions are:

A. Whether the Court of Appeals erred in interpreting 49 U.S.C. §10729, the "capital incentive rate" provision of the revised Interstate Commerce Act; and

[2] 49 U.S.C. §10101 *et seq.*

[3] *See, e.g.*, the *Powerplant and Industrial Fuel Use Act*, Pub. L. No. 95-620, 92 Stat. 3289 (1978); the *Public Utility Regulatory*

(*footnote continues*)

B. Whether the Court of Appeals erred in failing to require the Interstate Commerce Commission to articulate the rationale for its views in the decision below, in derogation of the public interest.

A.

The Court of Appeals indicated that the cases below required the first judicial interpretation of the "capital incentive rate" provision of the revised Interstate Commerce Act ("Act"), 49 U.S.C. §10101 *et seq.* Pet. App. at 3a. Section 10729 provides expedited consideration of rates filed pursuant to it and insulates any such rates, once approved, from being reduced for five years. *Id.* Section 10729 may be triggered by the mere conventional, ordinary-course-of-business purchase of two locomotives, if the Commission's and the Court of Appeals' interpretation of that section is accepted. *Id.* at 16a, 4c, 5d. It is, therefore, self-evident that §10729 provides an attractive vehicle for raising rates on "captive" coal traffic unless this Court restricts the breathtaking scope ascribed to §10729 by the Commission and the court below. *See* Pet. App. at 8a-20a.

B.

Apparently, the Court of Appeals thought that only "an abdication from reason" could provide grounds for setting aside the determination of the Commission as to the lawfulness of the proposed capital incentive rates. *Id.* Nevertheless, the Court of Appeals did acknowledge that "under traditional principles, a carrier's revenue needs

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(*footnote continued*)

Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978); and the *National Energy Conservation Policy Act*, Pub. L. No. 95-619, 92 Stat. 3206 (1978).

had no relevance to the determination of the reasonableness of any individual rate" *citing Scott County Milling Co.*, 194 I.C.C. 763, 785 (1933) and *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 592 (1949). Pet. App. at 31a and n. 51. Whatever the merits of the lower court's opinion for ratemaking in general, the Court of Appeals erred in deferring to the Commission to such an extent in the situation presented by these cases. Congress clearly intended that rulemaking on revenue adequacy precede individual rate decisions, *see* "Brief Amicus Curiae" of Congressman Eckhardt at 10-17, and the Commission should not have prejudged the outcome of its pending revenue adequacy proceeding as it did here. The Commission compounded its error by failing to make findings on the revenue adequacy of the railroads involved and the extent (if any) to which such presumed need could justify higher rates. The Court in such a case must vacate and remand for proper consideration of the matter so that meaningful court review is available. *See* Petition at 12-13.

The issues in this case are important to shippers and carriers, and most of all, to all consumers of electricity. Resolution of these issues by this Court is necessary to serve as a guide to the vast array of other pending litigation raising similar questions. *See* Appendices G and H to the Appendix.

II.

THE ISSUES INVOLVED ARE OF BROAD NATIONAL SCOPE.

The Houston and Arizona petition for a writ of certiorari raises fundamental issues concerning the exercise by the Interstate Commerce Commission of its rail rate regulation authority under the Interstate Commerce

Act as amended by the Railroad Revitalization and Regulatory Reform Act of 1976. Pub. L. No. 94-210, 90 Stat. 33 ("4-R Act").

In its decisions rendered in the Houston[4] and Arizona[5] cases, the Commission found that the 4-R Act established new ratemaking standards to be applied in evaluating the maximum lawful level for rates on individual movements of rail traffic. Pet. App. at 17c, 24d. However, the Commission has failed to articulate either in the Houston or Arizona cases, or in its subsequent coal rate decisions, a rational method of applying these new ratemaking criteria. The resulting confusion concerning the governing principles of ICC maximum rate regulation has occasioned not only the flurry of coal rate litigation before the Commission and the federal courts described in the petition for certiorari, but also a tremendous uncertainty, with respect to contemplated new coal movements, as to the rate levels which might ultimately be permitted on such movements by the ICC.

The delivered cost of the coal fuel has a major influence upon the economic feasibility of new coal-fired power generating facilities. The price of rail transportation is, in turn, a major element of the delivered price of the coal—frequently far exceeding the mine-mouth price of the coal itself. As the Department of Energy has correctly noted, the prevailing uncertainty over coal transportation pricing thus has a chilling effect

[4] *Incentive Rate on Coal—Cordero, Wyoming To Smithers Lake, Texas*, 358 I.C.C. 537 (1977), set out as Appendix D to the petition for certiorari.

[5] *Incentive Rate on Coal—Gallup, New Mexico To Cochise, Arizona*, 357 I.C.C. 683 (1977), set out as Appendix C to the petition for certiorati.

upon conversions to coal fuels.[6] At this time in our Nation's history, when coal must play such a major role in our campaign for energy sufficiency, this situation cannot be permitted to continue. The need for rational and consistent rail ratemaking policies and guidelines must be addressed and the Houston and Arizona cases provide the Court with an appropriate vehicle to consider these issues in a timely fashion. The importance of the issues far transcends the interests of the two individual utilities involved, impacting nationwide upon a major segment of the electric utility industry.

III.

THE FINANCIAL CONSEQUENCES OF THE ISSUES RAISED ARE OF MAJOR DIMENSIONS AND WILL BE DIRECTLY SHOULDERED BY THE NATION'S ELECTRIC UTILITY RATEPAYERS.

In a very real sense, amici appear before this Court more in the role of spokesmen for the ratepayers of their member companies than for the members themselves. In many parts of the country, increases in the cost of fuel, which ordinarily includes the cost of transportation required to deliver the fuel, are passed by utilities directly through to the consuming public, subject to regulatory scrutiny, by mechanisms which can be generally described as fuel cost adjustment pass-throughs. By operation of fuel cost adjustment pass-throughs, the burden of increases in coal freight rates is felt immediately and with full force by the consumer. Amici and their constituent members have been and will continue to be vigilant to protect their ratepayers from unjustified increases in the

[6] Statement of Fact and Argument of United States Department of Energy, dated August 4, 1978, in *Ex Parte 347, Western Coal Investigation—Guidelines for Railroad Rate Structure*, at 18-28.

cost of fuels and, in this case, in the cost of transporting the coal required for coal-fired power generating facilities.

The amount of money at issue in coal rate disputes which have been litigated before the Commission can be appreciated by reference to the Houston experience. In the Houston case here before the Court, the utility maintained that traditional ratemaking criteria and due consideration of the 4-R Act goals warranted establishment by the Commission of a rate no higher than $11.00 per ton, while the railroads requested and the ICC approved a rate of $15.60 per ton. Since the Houston facility requires approximately 5 million tons of coal per year, the resulting differential amounts to more than $23 million *per year* for this one movement! Moreover, since this rate in effect constitutes a base rate which is then periodically increased, this differential has a continuing effect. Thus, over the thirty year life of the involved Houston facility, the ultimate impact could greatly exceed $690 mllion on this movement alone.

The Houston case has, of course, been followed by numerous other rate disputes before the Commisson that have also involved huge sums.[7] It is clearly no exaggeration to state that billions of dollars are at stake for coal traffic alone in the resolution of the issues relating to the proper standards to be applied by the Commission in maximum rate regulation. Electric utilities and their ratepayers already face staggering financial demands for

[7] *See, e.g., Docket No. 36180, San Antonio, Texas v. Burlington Northern, Inc.*, Decisions served October 25, 1978 and June 1, 1979 (unprinted) involving rate increases of roughly $15 million per year and *Docket No. 36970, Annual Volume Rates On Coal—Wyoming To Flint Creek, Arkansas* and *Docket No. 36980, Southwestern Electric Power Co. v. Burlington Northern, Inc.*, combined Decision served May 25, 1979 (unprinted) involving increases of approximately $4.5 millicn per year.

the capital outlays which will be required to construct new coal-fired facilities. They must not be saddled with the tremendous additional costs which unjustly high railroad freight rates for coal transportation will occasion.

CONCLUSION

The importance of the issues raised by the Houston and Arizona petition and the magnitude of the financial consequences entailed in the resolution of these issues warrant the issuance by this Court of a writ of certiorari.

Respectfully submitted,

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